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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

August (Gus) Caito,

Appellant

v.

State of Indiana,

Appellee

On Appeal from the
Supreme Court of Indiana

JURISDICTONAL STATEMENT

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QUESTION PRESENTED

Were the rights of August Caito, as a target witness before the Hamilton County, Indiana, Grand Jury, under the Fifth and Fourteenth Amendments to the constitution of the United States violated by the Trial Court's finding of direct contempt? In fine, was August Caito's Fifth Amendment protection prohibiting self-incrimination as applied to the State of Indiana by the 14th Amendment of the United States violated when he was granted, upon the application of the State of Indiana, use immunity and derivative use immunity and compelled to testify in light of Mr. Caito's

target witness status. August Caito, due to his being a target witness, refused to testify, asserting his Fifth Amendment protection prohibiting compelled testimony and was thereafter found in direct contempt by the trial court. The issue is whether a grand jury target witness, a witness before the grand jury who stands accused with the crime under investigation, can be forced to testify over his assertion of the Fifth Amendment protection prohibiting self-incrimination merely by granting such witness use and derivative use immunity?

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OPINION BELOW

The opinion of the Supreme Court of Indiana has been officially reported and is cited in 459 N.E.2d 1179. A copy is reproduced herein as Appendix "A" to this petition.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action finding appellant in direct contempt of Court for his failure to testify before the Hamilton County Grand Jury. The judgment of the Supreme Court of Indiana was entered on the 29th day of February, 1984. Pursuant to the Indiana Rules of Appellate Procedure, a timely petition for rehearing was

filed with the Clerk of the Supreme Court of Indiana on the 19th of March, 1984. The petition for rehearing was denied on the 19th day of April, 1984. A copy is reproduced herein as Appendix "B".

A Notice of Appeal to the Supreme Court of the United States was timely filed on the 23rd of April, 1984. A copy is reproduced herein as Appendix "C".

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code Section 1257(2).

APPLICABLE CONSTITUTONAL PROVISIONS AND STATUTES

Fifth Amendment to the Constitution reads as follows:

"Criminal actions - Provisions concerning- Due process of law and just compensation clauses.-- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Amendment Fourteen to the Constitution of the United States reads as follows:

"Citizenship--Due process of law--Equal protection.--All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enfore any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The applicable Indiana Statutes read as follows:

I.C. 35-34-2-1 "Target" Defined

"Target" means a person who has been charged by information for an offense the grand jury is investigating, or who is a subject of the grand jury investigation."

I.C. 35-34-2-8 Witnesses; Use Immunity

(a) Upon request by the prosecuting attorney, the court shall grant use immunity to a witness

before the grand jury. The court shall instruct the witness by written order or in open court that any evidence the witness gives before the grand jury, or evidence derived from that evidence, may not be used in any criminal prosecution against that witness, unless the evidence is volunteered by the witness or is not responsive to a question by the grand jury or the prosecutor. The court shall then instruct the witness that he must answer the questions asked and produce the items requested.

(b) A grant of use immunity does not prohibit the use of evidence the witness gives in a prosecution for perjury under I.C. 35-44-2-1.

(c) If a witness refuses to give evidence after he has been granted use immunity, he shall be brought before the court and the court shall proceed as if the witness had refused in open court.

I.C. 35-34-2-7 Witnesses; refusal to answer; compelling testimony

(a) If a witness before the grand jury refuses to answer any question or produce any item, the prosecutor may inform the court, in writing, of the question asked or item sought and the reason given for the refusal. The court shall, after a hearing, decide whether the witness is required to answer the question or produce the item and the witness shall be informed immediately of the court's decision.

(b) If the court determines that the witness must answer the question or produce the item and the witness continues to refuse, he shall be brought before the court and the court shall proceed as if the witness had refused in open court.

(c) If the court determines that the witness may properly refuse to answer a question or produce an item based upon his privilege against self-incrimination, the prosecutor may request the Court to grant use immunity to the witness under Section 8 of this chapter.

STATEMENT OF THE CASE

On the first day of November, 1982, August (Gus) Caito was subpoenaed as a Target witness before the Hamilton County Grand Jury in the matter of the investigation of the death of Delvoyd Baker.

Mr. Caito appeared before said Grand Jury on December 8, 1983. Mr. Caito refused to testify asserting his United States Constitutional 5th amendment

protection prohibiting compelled self-incrimination. Pursuant to I.C. 35-34-2-8, the State moved the Court to grant use immunity to Gus Caito and order him to answer certain specified questions, which are as follows:

1. Please state your name.

2. Are you known by any other name or nicknames?

3. Where do you live?

4. How long have you lived at such address?

5. Where did you live prior to this address?

6. How long did you live at this other address?

7. Who lives with you at the present address? (Please state names, relationships, and ages.)

8. Where do you work?

a. What are your regular days and hours of employment?

9. What are your duties at your employment?

10. Do you have a supervisor?

a. If so, please state his/her name.

11. Please advise as to who assigns or what is the procedure for assignment of your work duties?

12. Are there records kept as to your employment hours and/or duties?

a. Who is the keeper of these records?

b. Where are these records kept?

13. Do you own a 1979 blue chevrolet van?

a. What is its license number?

14. If you do own such a van:

a. How long have you owned it?

b. Have you ever given anyone permission to drive it? If so, who and when?

c. Who has keys to it?

d. Where do you keep it?

e. What is it used for?

f. Who had possession or use of it on
October 1, 1982?
October 2, 1982?
October 3, 1982?

15. Directing your attention to Thursday, September the 30th, 1982, please answer the following questions:

a. Did you work on that date?

b. Where did you work or what were your assignments?

c. What time did you leave your home?

d. What route did you take going to work?

e. Did you make any stops going to work?
When?
Where?

f. What time did you arrive at work?

g. Did you leave work to go any place during work hours? If so, please state where and when?

h. What time did you leave work?

i. Please state location or locations you went after work?

j. Please describe route to location or locations?

l. What time did you arrive home?

m. What time did you go to bed?

n. What time did you get up?

o. Please state the next time that you left your home.
Who was with you?

What time?
What was your destination?

p. Please state the names and addresses of people you talked with during the day.

q. Did anyone see you on your arrival or leaving work?

r. How did you get to work if you drove? Please advise by what means.
If you did not drive, please state your means of arriving at work.

s. If you did not go to work, please state all of your locations during the day.

** MEMO: Repeat questions number 15, A through S, for the following dates:
Thursday, September 30, 1982.
Friday, October 1, 1982.
Saturday, October 2, 1982.

Sunday, October 3, 1982.

16. Have you ever seen Delvoyd Baker?
Where?
When?

17. Have you ever seen the individual whose picture is now shown to you and attached to this as Exhibit 1?
Where?
When?

18. When is the last time that you were in the Central Library of Indianapolis, Indiana?

19. Please describe all dates and times that you were in that area during the days of September 30th through October the 3rd.

20. Please advise if you picked up any persons in that area during the days of September 30th through October the 3rd.

    a. If so, please advise name or description of the person or persons.

The Court granted said motion and ordered Mr. Caito with Use and Derivative Use Immunity, to answer the above stated questions. Mr. Caito was represented to the Grand Jury where he once again refused to testify on the grounds that the answers may tend to incriminate him. The Court then issued an Order finding Mr. Caito in direct contempt, fined him Five Hundred Dollars ($500.00) and ordered him committed to the Hamilton County Jail for sixty (60) days. The sanctions were stayed pending a decision by this Court.

Mr. Caito appealed the trial court's decision to the Supreme Court of Indiana contending the statute forcing him to testify over the assertion of his 5th Amendment protection prohibiting compelled self-incrimination violated his Constitutional right to remain silent and therefor was unconstitutional as applied to him as a target witness. The Supreme Court of Indiana affirmed the Trial Court on all things. (See Appendix "A").

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents an important and substantial question of first

impression, as hereinafter described, in that the sole issue it presents is the constitutionality of compelling an individual who is the subject of an investigation to be a witness against himself.

The Constitutional privilege to remain silent is well founded in our nation's heritage. As stated in Brown v. Walker (1896) 161 U.S. 591 40 Led 819:

> "So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

The privilege against self-incrimination is one of the most fundamental of our constitutional rights. This privilege has been jealously protected by the judiciary. It is enmeshed in the very fabric of our nation. As stated by Justice Hunter in State ex rel Pollard v. Criminal Court of Marion County (1975) 329 N.E.2nd 573; "Children too young to know the three branches of government are quite capable of parroting the Miranda rights when playing cops and robbers. With maturity comes an appreciation of the significance in our scheme of government of the right of an accused to remain silent." at 587.

This Constitutional Right has expressly been extended to those persons appearing before a grand jury.

The grand jury is an ancient institution deeply rooted in Anglo-American history. The first criminal grand jury was established by the crown in 1164, to provide the centralized government with the benefit of local knowledge in the apprehension of criminals. The first grand jury was composed of twelve knights whose duty was to accuse those who, according to public knowledge, had breached the king's laws. As the institution developed, the grand jury acquired a protective role in the criminal

justice system through its power to refuse to return a true bill against those whom it believed to be innocent. Thus, the grand jury stood as a shield between the citizen who had incurred the wrath of the crown and was therefore being prosecuted on trumped-up charges. The dual function of the English grand jurors is expressly embodied in their oaths that ". . . they would accuse none whom they believed innocent, nor conceal any whom they thought guilty." Washburn, Manual of Criminal Law, 122 (1878).

The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination

where there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.

The Constitutional right to remain silent has been extended to those persons appearing before a grand jury. The crucial investigatory function of the grand jury and the general common-law principle that the public has a right to everyman's evidence required a device whereas the grand jury could obtain the evidence it necessarily needed to fulfill its duties. The historical solution to this dilemma between the imperatives of the privilege and the legitimate demands of

government to compel citizens to testify is to grant the witness immunity.

Appellant does not contest the Constitutional validity of granting use and derivative use immunity to grand jury witnesses, but only the validity of granting said immunity to "Target" witnesses. At odds here is an accused person's right to remain silent and the Grand Jury's function as an investigatory body.

A mere witness can be compelled to testify over his assertion of the 5th Amendment because the needs of the Grand Jury outweigh his liability and the immunity grant leaves the witness and the State in

substantially the same position as if the witness had claimed his 5th Amendment right to remain silent. That is, the immunity granted is co-extensive with the scope of the privilege. Kastigar v. U. S., 406 U.S. 441. Therefore, the contrasting public purposes are jointly fulfilled.

Can such joint fulfillment occur if a target witness is forccd to testify upon a grant of use immunity and derivative use immunity?

An indictment returned against an immunized witness by a Grand Jury which heard the immunized testimony is invalid as a matter of law.

"The superseding indictment was invalid as a matter of law. It was returned by the grand jury after hearing the immunized testimony of Tantalo. Such a showing required its dismissal. United States v. Hinton, 543 F2d 1002, 1010 (2d Cir. 1976). In Hinton this court, in an opinion by Judge Waterman, condemned the practice and prescribed the only remedy to be dismissal.

We believe that as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studies by the grand jury, cannot be contenanced. The procedure is so fraught with applicable constitutional problems and with the potential for abuse that in our supervisor power over the administration of criminal justice in the district courts of this

> circuit, cf. United States v. Toscanino, 500 F2d 267 (2d Circ. 1974), we are compelled to conclude that the procedure the Government adopted here falls outside the bounds of permissible prosecutorial conduct. Accordingly, we reverse the conviction of appellant Hinton and instruct that the indictment be dismissed as to her. Thus, it was error to deny the appellant's motion to dismiss the superseding indictment." U.S. v. Tantalo (1982) 680 F2d 903; See also In Re Perlin (1978, 7th Circuit) 589 F2d 260.

The consideration of the immunized testimony by a Grand Jury in determining whether to issue an indictment constitutes a use of the compelled testimony against the immunized witness. As stated by the Court of Appeals of the 2nd Circuit in Goldberg v. the United States (1973) 472 F.2d 513:

"We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such an indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their minds, cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case,' cf. Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), in defiance not only of 18 U.S.C. Section 6002 but of the command of Kastigar that the immunity must be 'coextensive with the scope of the privilege.'" 406 U.S. at 449, 92 S.Ct.. at 1664.

It readily appears that any use or derivative use of the immunized testimony is violative of the 5th Amendment prohibition. Therefore, any indictment (or information) premised upon immunized testimony would be fatally defective. An indictment issued by a subsequent grand jury which has heard evidence derived from the immunize testimony would likewise be defective.

The only remedy available to the accused upon indictment by a subsequent Grand Jury would appear to be to attempt to quash the indictment on the basis that it relied upon evidence derived from the immunized testimony. However,

this Court in U. S. v. Calandra (1974) 414 U.S. 338, noting the potential danger to the role and functions of the grand jury, refused to allow a challenge to an indictment, valid on its face, on the ground that the grand jury acted on the basis of inadequate or incompetent evidence including information obtained in violation of a defendant's 5th Amendment privilege against self-incrimination. The undue burden of reviewing the facts upon which the Grand Jury acted has been held to be sufficient reason to deny a motion to quash. Lawn v. U. S., 355 U.S. 339. It therefore appears that an accused could be indicted by a

subsequent grand jury who relied upon evidence derived from the immunized testimony and the Defendant indictee would not be afforded an opportunity to contest the indictment on the basis that immunized testimony had been considered by the indicting Grand Jury. That indictee, who had been forced to testify upon a grant of immunity has suffered a substantial harm he would not have realized had he been allowed to maintain his protection against compelled self-incrimination. Therefore, the test enunciated in Kastigar v. U. S., 406 U.S. 441 "whether the immunity granted is coextensive with the scope of the privilege" is not

fulfilled. The witness and the State is not left in substantially the same position as they were previous to the grant of immunity. The State may use the immunized testimony to formally charge the witness at a later date.

The burden expressed in Lawn v. U. S., supra, is equally felt in the trial of an immunized witness. While the affirmative duty does rest upon the State to prove by an unknown burden that the evidence is wholly independent, the effect upon the trial is dramatic. Each minutae of evidence will require a hearing for the Court to determine whether the wholly independent basis does exist.

A two day trial will become a lengthy trial draining the resources of the local community.

Industry of appellant's counsel has failed to unearth another state or territorial statute which authorizes compelled testimony from a target witness in exchange for use and derivative use immunity to that target and requiring him to testify before the same Grand Jury which has designated him the target or subject of their investigation. The only case law upon the issue has resulted in decisions that "use" immunity means "transactional" or complete immunity in such circumstances. People v. Cahill, 193 N.Y. 232, 86 N.E. 39,

and the line of New York cases following Cahill.

In conclusion, immunity is a necessary excepton to the 5th Amendment prohibition against compelling immunized testimony because of the public policy inherent in the Grand Jury's role in solving crimes. Immunity is allowed only to the extent that it coexists with the privilege being relinquished. But of a greater public purpose is not only solving a crime but of applying criminal sanctions to those individuals who perpetrate the crime. It appears granting use and derivative use immunity to the person who is the subject of the investigation merely

muddies the pools of justice. Lastly, the immunity does not coexist with the right relinquished in that the compelled testimony may be used against him to facilitate an indictment by a subsequent grand jury or a charge by information from the Prosecuting Attorney. The statute is unfair to the target witness and offers nothing to the prosecution of the guilty. It merely invites abuse by the authorities which is best controlled by requiring transactional immunity for all target witnesses forced to testify.

The issue herein is so substantial in its effect upon the criminal justice system and the

constitutional rights conferred upon the citizens of the United States as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

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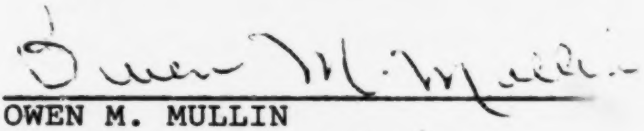
CERTIFICATE OF SERVICE

I, Owen M. Mullin, a member of the Bar of the Supreme Court of the United States and counsel of record for August (Gus) Caito, appellant herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregong Statement Of Jurisdiction as follows: on the State of Indiana, Appellee, by delivering the copies thereof to Hon. Linley E. Pearson, Attorney General of Indiana, attorney of record for the State of Indiana, Appellee, at his office located at 219 State House, Indianapolis, IN 46204, on July 18, 1984.

All parties required to be served have been served.

Dated July 18, 1984.



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APPENDIX "A"

In re Direct Contempt of Gus CAITO Concerning His Failure to Answer Questions Before the Grand Jury of the Hamilton Court.

No. 883S291

Supreme Court of Indiana.

Feb. 29, 1984

459 N.E.2d 1179

Alex R. Voils, Jr., Owen M. Mullin, James Clark, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Richard Albert Alford, Deputy Atty. Gen., Indianapolis, for appellee.

OPINION ON CRIMINAL PETITION TO TRANSFER

Givan, Chief Justice.

Appellant brings this petition pursuant to Appellate Rule 4(A)(10) seeking a review of the Hamilton Circuit Court's finding him in

direct contempt, and to challenge the constitutionality of Indiana's Grand Jury Use Immunity statute, I.C. Section 35-34-2-8 [Burns Supp. 1983], as it applies to target witnesses.

Appellant was subpoenaed as a target witness before the Hamilton County Grand Jury in the matter of the investigation of the death of Delvoyd Baker. Appellant complied with the subpoena. However, upon his attorney's advice, he refused to testify after being sworn, except to identify himself. He took the position that such answers might tend to incriminate him. The State then invoked the provisions of the following statutes pertaining to grand jury proceedings:

"35-34-2-6. Motion to quash subpoena-Rights of target-Use immunity.- (a) Any witness may file a motion to quash a subpoena duces tecum directed to that witness. The motion must include a statement of the facts and grounds in support of the objection to the subpoena. The court shall:

"(1) Promptly conduct a hearing on the motion; and

"(2) At the conclusion of the hearing, enter findings in support of its ruling.

(b) A target who is subpoenaed may move to quash a subpoena based upon his privilege against self-incrimination. The court shall grant the motion, unless the prosecuting attorney makes a written request that the target be granted use immunity in accordance with section 8[35-342-8] of this chapter. Upon request by the prosecuting attorney, the court shall grant use immunity to the target and order him to comply with the subpoena. [I.C. 35-34-2-6, as added by Acts 1981, P.L. 298, Section 3.]"

"35-34-2-8. Grants of use immunity -Refusal to give evidence after immunity granted.-(a) Upon request by the prosecuting attorney, the court shall grant use immunity to a witness before the grand jury. The court shall instruct the witness by written order or in open court that any evidence the witness gives before the grand jury, or evidence derived from that evidence, may not be used in any criminal prosecution against that witness, unless the evidence is volunteered by the witness or is not responsive to a question by the grand jury or the prosecutor. The court shall then instruct the witness that he must answer the questions asked and produce the items requested.

(b) A grant of use immunity does not prohibit the use of evidence the witness gives in a prosecution for perjury under I.C. 35-44-2-1.

(c) If a witness refuses to give evidence after he has been granted use immunity, he shall be

> brought before the court and the court shall proceed as if the witness had refused in open court. [I.C. 35-34-2-8, as added by Acts 1981, P.L. 298, Section 3.]"

The State moved the court to grant use immunity to appellant "in accordance with I.C. 35-342-8," and to order him to answer a list of written questions. The court granted the State's motion and ordered appellant to answer a lst of written interrogatories attached to the order. Appellant was again presented to the grand jury, and he once again refused to testify, claiming his privilege against self-incrimination. U. S. CONST. amend. V; IND. CONST. art. 1, Section 14.

The trial judge found apppellant in direct contempt of court pursuant to statute:

> "35-34-2-7. Refusal of witness to answer questions or produce items.-Procedures.-(a) If a witness before the grand jury refuses to answer any question or produce any item, the prosecutor may inform the court, in writing, of the question asked or item sought and the reason given for the refusal. The court shall, after a hearing, decide whether the witness is required to answer the question or produce the item and the witness shall be informed immediately of the Court's decision.
>
> (b) If the court determines that the witness must answer the question or produce the item and the witness continues to refuse, he shall be brought before the court and the court shall proceed as if the witness had refused in open court.

(c) If the court determines that the witness may properly refuse to answer a question or produce an item based upon his privilege against self-incrimiation, the prosecutor may request the court to grant use immunity to the witness under section 8 [35-34-2-8] of this chapter. [I.C. 35-34-2-7, as added by Acts 1981, P.L. 298, Section 3.]"

"34-3-7-2 [3-903]. Direct-Refusing to testify-Demeanor on witness stand.- Every person who, being sworn to testify as a witness in any court of record, in any trial or proceeding therein, shall refuse to testify touching the same; or who, being required by any court to be sworn in any such trial or proceeding, shall refuse to take an oath or affirmation therein; or who, while upon the witness stand, shall purposely so demean himself, as to retard or disturb the proceeding thereof, shall be deemed guilty of a direct contempt thereof. [Acts 1879 (Spec. Sess.), ch. 35, Section 2, p. 112.]"

The trial judge fined appellant five hundred dollars ($500.00), and ordered that he be held n the Hamilton County Jail for sixty (60) days or until he presented himself to the court and advised that he would testify before the grand jury as ordered. The court stayed the contempt sanctions pending this appeal.

[1] Appellant first argues the evidence is insufficient to support the court's finding of direct contempt. He concedes our standard of reviewing direct contempt procceeings requires this Court to accept as true the statement entered of record by the lower court of the matter

constituting the contempt, and to interfere with the judgment only where it clearly applies alleged acts do not constitute contemptuous acts. Grimm v. State, (1959) 240 Ind. 125, 162 N.E.2d 454, Russell v. State, (1979) Ind. App., 428 N.E.2d 1271.

[2] Under the statutes, if a grand jury witness refuses to testify invoking his privilege against self-incrimination, the trial judge may grant use immunity and derivative use immunity to the witness. The witness may then be compelled to testify, and if he refuses he may be found in contempt. This is precisely what occurred in the case at bar. Therefore,

appellant's acts of refusing to answer questions at the grand jury proceedings do indeed constitute direct contempt.

[3, 4] Appellant next challenges the constitutionality of the statute as applied to target witnesses. Our constitutions protect those accused of crimes from being compelled to testify against themselves. The privilege against self-incrimination is one of the most fundamental of our constitutional rights and has been jealously guarded by the judiciary. However, the privilege is not absolute, but must be balanced against the government's legitimate demands to compel citizens to testify so that,

in order to effect justice, the truth surrounding the criminal incident may be discovered. Lefkowitz v. Turley, (1973) 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274; In Re Contempt Findings Against Schultz, (1981) Ind. App., 428 N.E2d 1284. The balance between the imperatives of the privilege and the government's interest is achieved by granting witness immunity to those who are forced to testify against themselves. An immunity statute will be upheld where the immunity granted is coextensive with the scope of the privilege. Kastigar v. United States, (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212. The witness must be left

in substantially the same position as if he had properly exercised his privilege to remain silent.

Appellant claims Indiana's statute does not leave a target witness in such a position, and is therefore unconstitutional as applied in his case. He contends that the statute provides for, and the trial court granted, use immunity alone in exchange for the compelled testimony of the target.

[5] Three types of immunity may be granted a witness in exchange for his testimony: (1) transactional immunity: which prohibits the State from criminally prosecuting the witness for any transaction concerning that to which

the witness testifies; (2) use immunity: where the testimony compelled of the witness may not be used at a subsequent criminal proceeding; and (3) derivative use immunity: whereby any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution. Kstigar, supra; In Re Schultz, surpa.

[6] Conferring transactional immunity upon a witness is undoubtedly coextensive with his Fifth Amendment privilege since the compelled testimony can never be used against the witness n any criminal proceedings. This type of immunity grants the

same degree of protection to a citizen ordered to testify as though he had not testified at all. Kastigar, supra; Katz v. United States, (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576; Reina v. United States, (1960) 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249; Brown v. United States (1959) 359 U.S. 41, 79 S.Ct. 599, 3 L.Ed.2d 609 (overruled on other grounds); see Harris v. United States, (1965) 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240.

[7] The grant of use immunity alone cannot give a witness protection equivalent to the Fifth Amendment privilege. The shortcoming of use immunity is that,

although the compelled testimony cannot be admitted against the witness in a subsequent prosecution, other evidence derived from that testimony can. Use immunity *per se* cannot protect an individual's right not to give evidence against himself because the compelled testimony may still be employed by investigators who have thereby gained a knowledge of the details of the crime and other sources of incriminating evidence. As appellant in the case at bar argues, use immunity cannot alone provide protection coextensive with the Fifth Amendment right because the witness would have done less damage to his defense through claiming the privilege, than by

testifying with immunity. Lefkowitz, supra; Katigar, supra.

Appellant correctly contends that use immunity by itself is an inadequate substitute for the Fifth Amendment protection. However, he evidently misreads our statute, and the trial court's order. I.C. Section 35-34-2-8 specifically states "any evidence the witness gives before the grand jury , or evidence derived from that evidence, may not be used in any criminal prosecution against that witness . . . ." The United States Supreme Court has decided that statutes which compel the testimony of target witnesses in exchange for both use immunity and derivative use

immunity are constitutional, Kastigar, supra, even when they allow subsequent perjury prosecutions arising from false immunized testimony. United States v. Apfelbaum, (1980) 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250.

The situation before the Supreme Court in Kastigar was the same as the one now before this Court in the case at bar. The petitioners therein were summoned before a United States grand jury and refused to testify, after being granted immunity under 18 U.S.C. Sections 6002-6003, asserting the immunity was not coextensive with their privilege against self-incrimination. The District Court held them in

contempt and committed the petitioners to the custody of the Attorney General until either they responded to the grand jury's questions or the term of the grand jury expired. The Ninth Circuit Court of Appeals affirmed. The Supreme Court also affirmed the judgment saying:

> "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably

> broader protection that does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give tesstimony leading to the infliction of "penalties affixed to . . . criminal acts."' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." Kastigar, supra, 406 U.S. at 453, 92 S.Ct. at 1661, 32 L.Ed.2d at 222.

The Supreme Court also stated "immunity from use and derivative use 'leaves the witness and the

Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." Id., at 458-59, 92 S.Ct. at 1664, 32 L.Ed.2d at 225; quoting Murphy v. Waterfront Commission of New York, (1964) 378 U.S. 52, 79, 84 S.Ct. 1594, 1610, 12 L.Ed.2d 678, 695.

[8] Based on the above authority, we find I.C. Section 35-34-2-8 does not violate the Fifth Amendment of the United States Constitution, nor Art. I, Section 14 of the Indiana Constitution. Although the grant of use immunity and derivative use immunity is not impervious

to abuse by prosecutorial staffs and investigators, the Kastigar court intimated such potential misuse has been foreseen and adequately curbed by the directives of Murphy, supra, 378 U.S. at 79 N. 18, 84 S.Ct. at 1609, 12 L.Ed.2d at 695. Quoting Murphy, the Kastigar court stated:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." Kastigar, supra, at 460, 92 S.Ct. at 1665, 32 L.Ed.2d at 226.

The Kastigar court went on to state: "This burden of proof which we affirm as appropriate, is not limited to a negation of taint; rather, it imposes on the proseution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. Notwithstanding the fact that appellant might have fared better had he testified under the immunity granted, and thus placed this heavy duty of proof upon the State at any later prosecution to show that the evidence presented against him had an independent source, we find appellant chose the more certain route to penalty of contempt.

The trial court is in all things affirmed.

All Justices concur.

APPENDIX "B"

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204

TELEPHONE: 232-1930

No. 883 S 291

In Re: Direct Contempt of Gus Caito Concerning his Failure to Answer Questions before the Grand Jury of the Hamilton Court.

You are hereby notified that the Supreme Court has on this day Appellant's Petition for Rehearing is hereby DENIED.

Givan, C. All Justices Concur.

Please acknowledge receipt of this notice in order that our

records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 19th day of April, 1984.

/s/ Marjorie H. O'Laughlin
Clerk, Supreme Court and
Court of Appeals

APPENDIX "C"

IN THE

SUPREME COURT OF INDIANA

NO. 883 S 291

IN RE: DIRECT) CONTEMPT OF) GUS CAITO) CONCERNNG HIS) FAILURE TO) ANSWER QUES-) TIONS BEFORE) THE GRAND JURY) OF THE HAMIL-) TON COURT)	Appeal from the Hamilton Circuit Court Hon. Richard F. DeTar, Judge

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereb given that August F. "Gus" Caito, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme

Court of Indiana, affirming the Circuit Court of Hamilton County's judgment entered in this action on April 19, 1984.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated April 23, 1984.

Respectfully submitted,

/s/ Alex R. Voils, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Notice Of Appeal were duly served, this 23rd day of April, 1984, by 1st class, United States Mail, postage prepaid, upon the following:

Clerk, Hamilton Circuit Court
Courthouse
Noblesvile, Indiana 46060

Hon. Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Steven Nation
Hamilton County Prosecuting Attorney
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Noblesville, Indiana 46060

/s/ Alex R. Voils, Jr.
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BEST AVAILABLE COPY

Office-Supreme Court, U.S.
FILED
SEP 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-208

IN THE

Supreme Court of the United States

October Term, 1984

AUGUST CAITO,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

MOTION TO DISMISS THE JURISDICTIONAL STATEMENT OF PETITIONER, AUGUST CAITO

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QUESTION PRESENTED FOR REVIEW

Whether or not the Petitioner's privilege against compulsory self-incrimination was violated when he, a target witness, was granted both use immunity and derivative use immunity and was ordered to testify before a grand jury?

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Respondent, the State of Indiana, respectfully requests that the court grant the Respondent's motion to dismiss and, thereby, refuse to review the decision entered by the Supreme Court of Indiana in Cause Number 483 S 119 on February 29, 1984.

OPINION BELOW

The Supreme Court of Indiana entered an opinion in this cause on February 29, 1984. The opinion is set forth in Petitioner's Appendix at A-1 and is officially reported at 459 N.E.2d 1179 (Ind. 1984). A petition for rehearing was

timely filed and was denied by the Supreme Court of Indiana on April 19, 1984.

STATEMENT OF THE CASE

The Petitioner, August Caito, was subpoenaed, as a target witness, to testify before a grand jury. The Petitioner complied with the subpoena. However, due to the advice of his attorney, the Petitioner refused to testify, after being sworn, except to identify himself. The Petitioner contended that his answers to other questions might incriminate him.

Subsequently, the Respondent, the State of Indiana, petitioned the trial court pursuant to IC § 35-34-2-8 (Burns Supp. 1984), to grant use immunity and derivative use immunity and to order the Petitioner to respond to a list of written questions. The trial court not only granted the Respondent's motion, but also ordered the Petitioner to answer the written interrogatories. The Petitioner again appeared before the grand jury and refused to testify claiming his privilege against self-incrimination. U.S. Const. amend. V; Ind. Const. art. I, § 14.

Consequently, the trial court determined the Petitioner to be in direct contempt of court, fined him five hundred dollars ($500.00), and ordered that he be held in jail for sixty (60) days or until he presented himself to the court to advise that he would testify before the grand jury as ordered. The trial court, however, stayed the contempt sanctions pending review by the Supreme Court of Indiana. The Supreme Court affirmed the judgment of the trial court.

SUMMARY OF THE ARGUMENT

The Indiana use immunity statute, IC § 35-34-2-8, does not violate the Fifth Amendment of the United States

Constitution since the statute compels testimony of target witnesses in exchange for use immunity and derivative use immunity which gives a witness protection equivalent to the Fifth Amendment privilege.

ARGUMENT

The Petitioner, August Caito, was subpoenaed, as a target witness, to testify before a grand jury. The Petitioner complied with the subpoena. However, due to the advice of his attorney, the Petitioner refused to testify, after being sworn, except to identify himself. Consequently, the Respondent, the State of Indiana, petitioned the trial court pursuant to IC § 35-34-2-6 (Burns Supp. 1984) and IC § 35-34-2-8 (Burns Supp. 1984) to grant use and derivative use immunity and to order the Petitioner to respond to a list of written questions. IC § 35-34-2-6 reads:

> (a) Any witness may file a motion to quash a subpoena duces tecum directed to that witness. The motion must include a statement of the facts and grounds in support of the objection to the subpoena. The court shall:
>
> (1) Promptly conduct a hearing on the motion; and
>
> (2) At the conclusion of the hearing, enter findings in support of its ruling.
>
> (b) A target who is subpoenaed may move to quash a subpoena based upon his privilege against self-incrimination. The court shall grant the motion, unless the prosecuting attorney makes a written request that the target be granted use immunity in accordance with section 8 [35-34-2-8] of this chapter. Upon request by the prosecuting attorney, the court shall grant use immunity to the target and order him to comply with the subpoena.

IC § 35-34-2-8 provides:

> (a) Upon request by the prosecuting attorney, the court shall grant use immunity to a witness before the grand jury. The court shall instruct the witness by written order or in open court that any evidence the witness gives before the grand jury, or evidence derived from that evidence, may not be used in any criminal prosecution against that witness, unless the evidence is volunteered by the witness or is not responsive to a question by the grand jury or the prosecutor. The court shall then instruct the witness that he must answer the questions asked and produce the items requested.
>
> (b) A grant of use immunity does not prohibit the use of evidence the witness gives in a prosecution for perjury under IC 35-44-2-1.
>
> (c) If a witness refuses to give evidence after he has been granted use immunity, he shall be brought before the court and the court shall proceed as if the witness had refused in open court.

The trial court not only granted the Respondent's motion, but also ordered the Petitioner to answer the written interrogatories. In his jurisdictional statement, the Petitioner challenges the constitutionality of the immunity statute, IC § 35-34-2-8.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The amendment not only protects an individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, where the answers might incriminate him in future criminal proceedings. This privilege, however, is not inviolable. It must be balanced against the government's legitimate demands to compel citizens to testify so that the truth surrounding a criminal

incident may be discovered. *Lefkowitz v. Turley*, (1973) 414 U.S. 70, 94 S.Ct. 316. Moreover, an immunity statute will be upheld where the immunity granted is coextensive with the scope of the privilege. A witness must be left in substantially the same position as if he had properly exercised his privilege to remain silent. *Kastigar v. United States*, (1972) 406 U.S. 441, 92 S.Ct. 1653. In the present case, the Petitioner contends that the grant of use immunity and derivative use immunity to a target witness does not leave a target witness in such a position.

When a witness testifies under the auspices of an immunity act, the extent of the immunity granted has significant ramifications for the witness as well as the government. If the witness receives *transactional* immunity, he will be secure from any future indictment or conviction for the offenses to which his compelled testimony relates. In essence, transactional immunity operates as a complete pardon for the offenses disclosed by the witness' testimony. An award of *use* immunity simply prohibits prosecutorial authorities from using compelled testimony in any respect but does not proscribe future prosecutions. In addition, any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution under *derivative use* immunity.

In the instant case, the Petitioner asserts that no immunity statute, however drafted, can afford a lawful basis for compelling incriminating testimony. It is true that use immunity, alone, cannot protect an individual's right not to give evidence against himself because the compelled testimony may be employed by investigators who have thereby gained knowledge of the details of the crime and other sources of incriminating evidence. Nevertheless, it is well established that statutes which compel the testimony of target witnesses in exchange for both use immunity and derivative use immunity are

constitutional. *Kastigar, supra.* In *Kastigar,* the United States Supreme Court ruled:

> We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to...criminal acts."' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. *Kastigar, supra,* 406 U.S. at 453, 92 S.Ct. at 1661.

Clearly, IC § 35-34-2-8 does not violate the Fifth Amendment of the United States Constitution or art. I, § 14 of the Indiana Constitution. Moreover, a person accorded use immunity and derivative use immunity and is subsequently prosecuted is not dependent upon the integrity and good faith of the prosecuting authorities for the preservation of his rights. Quoting, in part, *Murphy v. Waterfront Commission of New York,* (1964) 378 U.S. 52, 84 S.Ct. 1594, the *Kastigar* court stated:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have

> the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Thus, the immunity provided by IC § 35-34-2-8 leaves a witness in substantially the same position as if the witness claimed the Fifth Amendment privilege. The immunity is coextensive with the privilege.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that its Motion to Dismiss the Jurisdictional Statement of Petitioner be granted.

Respectfully submitted,

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kls:0459p